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Supreme Court, U.S.
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No. 98-837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JESSE WOODROW SHOTTS,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue
Suite 7912
New York, NY 10118
(212) 967-0667

COUNSEL OF RECORD

AMY ADELSON
Of Counsel

Attorneys for Petitioner
JESSE WOODROW SHOTTS

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THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER THE TERM "CORRUPTLY PERSUADE" AS USED IN THE WITNESS TAMPERING STATUTE CRIMINALIZES PERSUASION UNACCOMPANIED BY THREATS, FORCE OR INTIMIDATION

This Petition asks this Court to resolve what the term "corruptly persuades" means when used in the "witness tampering" statute, 18 U.S.C. § 1512. Shotts was convicted of two counts of "witness tampering" – one, for telling an employee and co-conspirator, in response to her question about the FBI, that if she "just [did] not say anything [she] wasn't going to be bothered," and two, for instructing another employee to destroy bail bonds. In both cases, Shotts' statements were upheld as "corrupt persuasion," although there was no evidence that he threatened, coerced, intimidated or pressured either employee.

The government acknowledges that the Eleventh Circuit's decision in this case, which defines corrupt persuasion as any speech "motivated by an improper purpose" (App. 24), is "in tension" with the decision of the Third Circuit in United States v. Farrell, 126 F.3d 484 (3d Cir. 1997), which requires proof of culpable conduct. (Brief in Opp. at 7) The government also recognizes that Farrell, in turn, rejected the contrary interpretation the Second Circuit accorded the term

"corrupt persuasion" under 18 U.S.C. § 1503. United States v. Thompson, 76 F.3d 442 (2d Cir. 1996). Nevertheless, the government argues that the issue posed in this case is little more than a dispute over the weight of the evidence, complicated by a "narrow area of disagreement" over how a few words in a federal statute should be interpreted. (Brief in Opp. at 7) The issue is far more substantial than the government suggests.

The disagreement is not narrow, but profound, going to the very nature of what conduct is proscribed. The Second and Eleventh Circuits have held that all the government need show to establish the element of "corruption" is an improper motive. Under that broad reading of the "corrupt persuasion" language, virtually any speech "corruptly" motivated -- itself an extremely vague concept -- can be deemed a federal crime. It would permit a conviction in the very example given by the government – a mother urging her son to claim his Fifth Amendment right (Brief in Opp. at 8, n.5) – if the mother's purpose was to help her son by impeding the investigation into her son's activities.

In contrast, the Third Circuit has held that something more must be shown – that the government must prove some form of coercive or otherwise

culpable conduct.[1] Although the government seems to be implying that Farrell is somehow distinguishable from this case, both cases involve non-coercive statements to co-conspirators that they have no obligation to talk to the authorities. If Shotts were prosecuted in the Third Circuit, since the government put in no evidence of bribery or of coercive or intimidating conduct, his convictions for witness tampering could not be sustained.[2]

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[1] The Fifth Circuit has held that the term "corruptly" when used in 26 U.S.C. § 7212(a), is vague and overbroad if defined to mean "with improper motive on bad or evil purpose." United States v. Reeves, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985). That suggests that, were the Fifth Circuit to be presented with interpreting the "corruptly persuade" language of § 1512, it would side with the Third Circuit. Moreover, the District of Columbia Circuit, in United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), while not addressing the precise question at issue here, found the word "immoral" too vague to survive constitutional scrutiny when used in a companion obstruction of justice statute.

[2] Despite the government's suggestion to the contrary, the Eleventh Circuit did not find any evidence of threats, force, or intimidation. As to Mr. Shotts' response to Ms. Kennedy's question about the FBI, all the Court concluded was that "while not

There is more than simply "tension" in the cases. There is a fundamental disagreement over what type of conduct is prohibited. Which interpretation of the "corrupt persuasion" provision is correct is undoubtedly an important question warranting this Court's review. At this very moment, the United States Senate is being asked to interpret and apply the very statute at issue in this Petition. Cheryl Mills, Deputy Counsel for the President, has advised the Senate that the United States Attorneys' Manual requires that, in a Section 1512 prosecution, the government prove "an effort to threaten, force, or intimidate another person," and "an intent to influence the person's testimony." As Ms. Mills explained it on the Senate floor, "'corruptly persuade' for career prosecutors requires some element of threat or intimidation or pressure." Transcript of Deputy Counsel Cheryl Mills' Statement on January 20, 1999. 1999 WL 20507 (F.D.C.H.)

If Ms. Mills correctly stated the Justice Department's view – a view that cannot be reconciled with its position in this case -- then, as a general policy

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overwhelming, the jury could reasonably have inferred ... that Shotts was attempting with an improper motive to persuade Kennedy not to talk to the FBI." (App. 26) And as to Kennedy's testimony that Shotts told another employee to destroy certain bail bonds, the Eleventh Circuit never even addressed whether Shotts' statement constituted "corrupt persuasion." (App. 26-28)

matter, the government agrees with the reasoning of Farrell. But, as this case amply demonstrates, not all prosecutors are complying with the Manual, the Justice Department itself does not adhere to its own policy, and some Circuits are allowing convictions to stand without proof of threats, force, or intimidation.

The government also misapprehends the First and Fifth Amendment rights at issue in this case. While Shotts may have had no Fifth Amendment right to persuade Kennedy not to speak to the authorities (Brief in Opp. at 12, n.8), he had a First Amendment right to answer Ms. Kennedy's question about what she should do by advising her of her Fifth Amendment right not to talk with the FBI. Both constitutional rights are clearly implicated when a person is convicted of a felony for doing nothing more than telling a co-conspirator that she need not talk to the authorities.

The "witness tampering" statute is broad, but it is not, and cannot be allowed to be, endlessly elastic. The words "corruptly persuade" must mean something more than simply speech with an improper purpose or else the statute will inevitably trespass on speech that is constitutionally protected. As the Senate trial of President Clinton demonstrates, the proper application of the "corruptly persuade" language is a recurring question of undeniable importance. This case, with its simple fact pattern and with the legal issues narrowed by the reversal of all the other convictions, presents the question its starkest form. This Court should take this

opportunity to resolve the conflict in the Circuits. The Petition for a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue
Suite 7912
New York, NY 10118
(212) 967-0667

Counsel of Record

Amy Adelson
Of Counsel